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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 415

JAMES GASTON AND JOSEPH ROBINSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgments of conviction were affirmed by the court of appeals without opinion.

JURISDICTION

The judgments of the court of appeals were entered on June 18, 1958 (Pet. 9-10; J.A. 32-33). A petition for rehearing was denied on September 4, 1958 (Pet. 11; J.A. 64). The petition for a writ of certiorari was filed on October 3, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners, who were indicted on gambling charges, were denied a trial by an impartial jury where, on the *voir dire* examination, about 90 per cent of the panel rose in response to the question whether any of them had made a bet of any kind, but none rose when they were asked whether their gambling or any unfortunate experience in gambling would in any way prevent them from rendering a fair and impartial verdict.

STATUTE INVOLVED

11 D.C. Code 1417 provides:

> No person shall be competent to act as a juror unless he be a citizen of the United States, a resident of the District of Columbia, over twenty-one years of age, able to read and write and to understand the English language, and a good and lawful person, who has never been convicted of a felony or a misdemeanor involving moral turpitude.

STATEMENT

Petitioners were convicted after a jury trial in the District Court for the District of Columbia (R. 149, 152-153) on an indictment in five counts charging violations of the District of Columbia gambling laws and failure to pay the special tax imposed by 26 U.S.C. 4411 upon persons engaged in the business of accepting wagers (R. 145-146). The court of appeals affirmed without opinion (Pet. 9, 10) and denied rehearing (Pet. 11.)

On appeal the only question raised by petitioners was the validity of a search warrant (Pet. 22). The question presented by the petition for a writ of certiorari—the impartiality of the jury—was raised for the

first time in the petition for rehearing in the court of appeals (Pet. 12, 22; J.A. 36-56). On that question the record shows as follows:

During the *voir dire* examination of the jury panel, defense counsel was allowed on motion (R. 165-166) to ask the members of the panel whether any of them had ever made a bet of any kind. About ninety per cent of the panel rose (R. 186-187, 188-189). A colloquy between counsel and the trial judge followed in which the trial judge observed that 11 D.C. Code 1417 (*supra*, p. 2) barred as jurors only those who had been convicted of a crime and that, if defense counsel were right that "good and lawful" persons meant only those who had never committed a crime, "we are just not going to get a jury to try this case, and that doesn't seem reasonable" (R. 187-188). The judge then asked the jurors whether the fact that they had engaged in some type of gambling would in any way prevent them from sitting in this case or from rendering a fair and impartial verdict. None of the jurors rose (R. 190-191).

Petitioners' counsel then requested that the jurors be asked whether any of them gambled "with professional bookmakers and, if so, whether they feel that professional bookmakers who are reducing odds to 20 to 8, 8 to 1, and 4 to 1 on horse bets, and to the use of cut numbers in the numbers game, if they regard that practice on the part of the professional gamblers in such a fashion that they wouldn't be inclined to give a fair bet either, a fair deal" (R. 193-194). After discussion, the judge put the question to the jurors in the following form: "Is there any juror on this panel by reason of having made a bet, any bet with these bet makers and bookmakers or any other form of gambling because of any unfortunate experience that you had in that con-

nection or any unfortunate experience that any member of your family may have had or any one else that you know has had in that connection, that you have such a sour taste in your mouth by virtue of such experience that you feel that you could not be fair to the defense in this case?" None of the jurors rose (R. 196).

At that point the judge said that he assumed that each of the jurors, by reason of his silence, had indicated that there had been nothing in his life concerning gambling activities which would influence him against acting fairly and impartially in this case. The judge then asked counsel if they were satisfied. Each said he was (R. 196).

ARGUMENT

Petitioners' contention (Pet. 2, 28-30) that the trial judge arbitrarily cut off inquiries into the possibility of a jury bias against gamblers is not supported by the record. After the disclosure that substantially all of the jurors had made bets at some time during their lives, the judge and defense counsel collaborated in a conscientious effort to ascertain whether any of the jurors had had a gambling experience that might influence him in such a way that he could not be fair to the defense. Although the question was not put in the precise form suggested by him, defense counsel made no objection to the judge's phrasing, which, indeed, was broader in scope than his own suggestion. When the jurors responded unanimously in the negative, counsel suggested no further questions and expressed his satisfaction with the panel.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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NOVEMBER, 1958.

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